

STATE OF MINNESOTA
IN SUPREME COURT
A08-2169

Norm Coleman, et al.,

Petitioners,

vs.

Mark Ritchie, Minnesota Secretary of
State, The Minnesota State Canvassing
Board, Isanti County Canvassing Board, et
al.,

Respondents.

Al Franken for Senate and Al Franken,

Intervenor-Respondents

**JOINT MOTION FOR
CLARIFICATION AND/OR
MODIFICATION OF THIS COURT'S
ORDER OF DECEMBER 18, 2008.**

TO: CLERK OF THE APPELLATE COURTS; JAMES K. LANGDON, FREDERIC W. KNAAK, and TONY TRIMBLE, ATTORNEYS FOR NORM COLEMAN; DAVID L. LILLEHAUG and WILLIAM Z. PENTELOVITCH, ATTORNEYS FOR AL FRANKEN; LORI SWANSON, MINNESOTA ATTORNEY GENERAL, ATTORNEY FOR MARK RITCHIE, AND MINNESOTA SECRETARY OF STATE; STATE OF MINNESOTA CANVASSING BOARD; ISANTI COUNTY CANVASSING BOARD; SCOTT COUNTY ELECTIONS BOARD.

The parties below, through their attorneys, move this Court to amend its Order of December 18, 2008, with respect to the process for opening and counting rejected absentee ballots. The parties seek the amendments to preserve the secrecy of the ballots of voters whose absentee ballots were erroneously rejected.

As grounds for this motion, the parties state:

1. This Court's December 18, 2008, Order directed local election officials and the candidates to identify absentee ballots they agree were rejected in error. Order at ¶3. The Order further directs that such ballots shall be opened and counted and "its vote for United States Senator added to the total votes cast for that office in that precinct." *Id.* The Order directs county canvassing boards to "file an amended report including the absentee ballot(s) so counted." The Order also directs the State Canvassing Board to "accept the amended report and include its numbers in the pending recount."

2. Upon review of the Court's Order, it appears that in a significant number of precincts throughout the state the number of absentee ballots identified by local election officials and the candidates as rejected in error will be quite small. In addition, pursuant to a data practices ruling previously issued in the Ramsey County District Court most of the counties throughout the state have made available to the campaigns and to the public a list of persons whose absentee ballots were rejected as well as copies of the rejected absentee ballot envelopes. Therefore, if the county canvassing boards were to report amended results in the Senate race by precinct, there is a significant risk to ballot secrecy. In addition, in a number of smaller counties, the number of erroneously rejected absentee ballots to be opened and counted is small enough that even reporting results at the county level poses a risk to ballot secrecy.

3. Therefore, the parties listed in the attached stipulation respectfully request that this Court modify paragraph 3 of its December 18, 2008, Order by deleting everything after the second sentence and adding the following in its place:

Any absentee ballot return envelopes that the local election officials and the candidates agree were rejected in error shall be delivered, unopened and uncounted, to the Minnesota Secretary of State no later than January 2, 2009, along with a notice declaring the number of ballots so delivered. If in any county there are no absentee ballot envelopes that the local elections officials and the candidates agree were rejected in error, the local election officials shall notify the Secretary of State of that fact no later than January 2, 2009. No later than January 4, 2009, the Minnesota Secretary of State shall open and count the absentee ballots delivered pursuant to the Order. A candidate shall be permitted to challenge the declaration of which candidate for United States Senate such a ballot is to be counted for, using the challenge standards utilized during the pending recount process. The Secretary of State shall file a report with the State Canvassing Board indicating the total votes each candidate for United State Senator received among the ballots so received and counted and the State Canvassing Board shall receive the report, consider any challenges, and include the absentee ballots counted in its numbers in the pending recount and canvas. No county canvassing board shall report on the results contained in the ballots delivered to the Minnesota Secretary of State. The ballots opened and counted by the Minnesota Secretary of State relating to the vote for United States Senate may be scanned and copied for use by the candidates, but any portion of the ballot that might identify the origin of the ballot will be redacted from such scans. Candidates, their representatives and the State Canvassing Board may visually observe the entire original ballot, but shall not make a record of the redacted information. After the recount and canvas process for the ballot has been completed, the ballot shall be retained under seal and

may not be disclosed except by Order of this Court and in any election contest related to the election for United States Senate. The ballots shall be returned to the counties for retention for the period set forth in Minnesota Statutes section 204B.40.

CONCLUSION

In accordance with the foregoing, the parties listed below, through their attorneys, respectfully request this Court amend its order as described above in order to best promote ballot secrecy.

Dated: December 23, 2008

Respectfully Submitted,

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